Issue date: 08Dec2000

U.S. Department of Labor

Office of Administrative Law Judges
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Case No.: 2000-LHC-1059

OWCP No.: 06-99366

In the Matter of:

RAYMOND S. GORDON,
Claimant

against

NORTH FLORIDA SHIPYARDS, INC.,
Employer

APPEARANCES:

DEBORAH BASS-FRAZIER, ESQ.
On behalf of the Claimant

DOUGLAS BROWN, ESQ.
On behalf of Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER ON SECTION 22 MODIFICATION

This is a claim for modification of benefits awarded under the Longshore and Harbor Worker's Compensation Act (hereinafter "the Act"), 33 U.S.C. § 901, et seq., to RAYMOND S. GORDON ("Claimant") against NORTH FLORIDA SHIPYARDS, INC. ("Employer") for injuries allegedly sustained during the construction of a vessel. Employer now moves for modification of the original award based on changes in the Claimant's disability status.

The issues raised here could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held August 29, 2000 in Mobile, AL.

STIPULATIONS

Prior to the hearing, the parties agreed to a joint stipulation (JX-1):[1]

1. The injury/accident occurred on October 23, 1986;

2. The injury occurred within the course and scope of the Claimant's employment;

3. An employer/employee relationship existed between the Claimant and the Respondent at the time of the accident;

4. The Employer was timely notified of the injury;

5. Notice of Controversion was filed on October 8, 1990;

6. An informal conference was held on January 23, 1991;

7. The Claimant's average weekly wage at the time of his injury was $418.18;

8. The Claimant was temporarily totally disabled from October 23, 1986 until December 12, 1988 and compensation was paid at $278.79 during this period;

9. The Claimant received a permanent disability rating of 5% of his body as a whole;

10. The Claimant reached maximum medical improvement as of December 12, 1988.

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[1] The following references will be used: TX for the official hearing transcript; JX-__ for Joint exhibits; CX-__ for the Claimant's exhibits; and RX-__ for Employer's exhibits.

ISSUES

The parties listed the following specific issues as unresolved:

1. Whether a change of conditions has occurred to justify modification of the prior award(s);

2. The causal relationship between the Claimant's current disabilities and his October 23, 1986 on-the-job injury;

3. Liability for the Claimant's underpaid compensation benefits;

4. Liability for provision of injury-related medical and psychological treatment;

5. Payment of additional compensation benefits after maximum medical improvement date of December 12, 1988 and before Claimant's suitable alternate employment with a laundry beginning May 1991;

6. Interest and attorneys fees.

SUMMARY OF FACTS

I. Procedural History

The extraordinarily tortured procedural history of this case can be summarized as follows. The Claimant was injured on October 23, 1986 while working for the Respondent, North Florida Shipyards in the process of renovating a Cruise Ship at Cocoa Beach, Florida. His claim came before this court, and in January of 1993 we awarded benefits to the Claimant for his injuries. 1993 *Decision and Order Awarding Benefits*, p.3 (Case No. 92-LHC-00490). That decision was appealed to the BRB in October of 1993. That appeal, however, was stayed pending this Court's decision on Employer's first petition for modification. *Gordon v. North Florida Shipyards, Inc.*, BRB 94-137 and 94-137A (Nov. 30, 1994) (unpub.). We filed a declaration denying the Employer's first petition for modification in April of 1995. In July of that year, the Board lifted the stay on its proceedings and appeals were taken. The Board subsequently affirmed this court's decision on the first petition for modification.

Upon issuance of the Supreme Court's decision in *Rambo v. Metropolitan Stevedore Co.,* 515

U.S. 291 (1995) (*Rambo I*), our order denying the 1994 modification petition was vacated and the case remanded for consideration of wether there had been a change in the Claimant's post-injury earning capacity. In May of 1997 we remanded the case to the District Director for consideration of the Claimant's request for a supplemental default order. Finally, in January of 2000, the District Director referred this case back to the Court for consideration of the Employer's second petition for modification. While this referral is procedurally inexplicable, it appears to leave the case to us for a final determination on the merits of the party's claims.

II. Claimant's Employment Since 1991

In 1991, after several years of being permanently totally disabled, the Claimant returned to work as a presser with the base laundry at Eglin Air Force Base.[2] (2d. TX, 35). Claimant worked at that position from May of 1991 until April of 1993. (2d. TX, 33). In April of 1993 the presser positions at the base laundry were taken over by federal prison inmates, and the Claimant was dismissed from that position. At that time, he was reassigned to the medical logistics service at the base hospital. He testified that he worked at this position from April of 1993 through October of 1993. (2d. TX, 33). As his position at the base hospital was being phased out, Claimant was unfortunately hospitalized for psychiatric difficulties.[3] (2d. TX, 38).

Following his discharge from the hospital position, the Claimant testified that he worked for several months at odd maintenance and other jobs before finally catching on as an apprentice brick mason with Mr. Wilson's masonry company. (2d. TX, 39). The Claimant testified that he worked in that position from the spring of 1996 until approximately November of 1996. (2d. TX, 42). He admits that he left the position because he had back problems more than once while performing it. (2d. TX, 42).

In early 1997, the Claimant went to work for the Air Force 96th Squadron Support Services Outdoor Recreation Program at Ben's Lake Marina. He worked for that division of the Air Force as a forklift operator putting private boats in and out of the water. (2d. TX, 43-44). Claimant testified that he typically worked a 40 hour week at this position and that by the time the facility was closed for remodeling he was earning $8.05 per hour. (2d. TX, 48). The Claimant worked for this facility until February of 2000 when the facility was closed for remodeling. (2d. TX, 54). He testified that he had two injuries while he was working at Ben's Lake Marina. (2d. TX, p. 54). He also testified that when the marina closed for reconstruction he went to another outdoor recreation facility part time to try to assist with other duties of the facility. During the reconstruction, however, he was officially furloughed and received furlough benefits

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[2]The Court is impressed that the Claimant apparently sought and obtained this position on his own, without the benefit of assistance from Employer or the Government. This is precisely the kind of initiative that the Court would prefer to see from all claimants.

[3]Claimant testified that this particular psychiatric treatment was not related to his workplace injury. (2d. TX, 38).

for 6 months. Claimant testified that he intended to return to the Ben's Lake Marina in November of 2000 when it reopened. (2d. TX, 55-56).

During the time of his furlough, Claimant worked with a friend who ran her own business cleaning newly constructed houses and condominiums. In exchange for his window washing services in this endeavor the owner paid his rent of $675 per month. (2d. TX, 58-59). Since that time, the Claimant testified that he had worked for himself. He stated that he had done general maintenance work, including painting, hanging paneling, hanging doors, and trying to unclog a sewer line. (2d. TX, 60). The Claimant testified that he had not sought other jobs because he had a position that he liked and because he did not want to jeopardize his position with the NAF to receive retirement benefits. (2d. TX, 66).

DISCUSSION

I. Jurisdiction

This is a petition for modification of an award of compensation under section 22 of the Act. The Claimant was initially injured while working for the Respondent in the refurbishment of a cruise ship afloat in the navigable waters of the Gulf of Mexico in 1986. There is no doubt that this Court has jurisdiction. (JX-1).

II. Modification

Two questions are presented to this court for our determination. First, is the Employer entitled to a modification of our original award because of a change in either the Claimant's economic or physical circumstances? Second, is the Claimant entitled to additional payments of compensation for permanent partial or permanent total disability and medical benefits by virtue of our original order?

A. Modification of Award

This Court originally awarded Claimant compensation for temporary total disability from October 23, 1986 until December 12, 1988 based on an average weekly wage of $418.18. We also awarded the claimant compensation for permanent partial disability from December 12, 1988 to date and continuing based on this average weekly wage, interest and reasonably necessary medical care. 1993 *Decision and Order*, p. 10 (Case No. 92-LHC-00490). It is apparent from the argument of counsel that the Claimant has had significant difficulty procuring payment of benefits pursuant to our original order.

Subsequently, the Claimant, through his own diligence and hard work we might add, found a job. In May of 1991 he began working as a presser for the laundry at Eglin Air Force Base. The testimony and evidence reflects that the Claimant worked steadily, though not necessarily continuously, from this point until the present. (2d. TX, 33-66). The Court credits the Claimant's testimony as believable and finds that, to the extent possible, this gentleman made every attempt to find work that he was capable of performing.

Employer's counsel urges through their brief and the questions they asked at the hearing that if the Claimant is capable of working for the Ben's Lake Marina, he is also capable of working at other jobs. (*See Generally*, Employer's Post Trial Brief; 2d. TX, 50-66). Counsel goes so far as to quiz the Claimant about why he did not seek work at another private marina when he was furloughed from Ben's Lake. Counsel also presses Claimant as to why he did not seek other jobs during his furlough. The truth of the matter in the Court's mind is that this gentleman did not seek alternate employment because he had already found a job which suited him. That job was working at the Ben's Lake Marina. Despite the furlough, Claimant had no reason to believe that he would not return to work at the marina following its reconstruction. The Court does not think that we should punish the Claimant for holding a steady position which he admittedly enjoys and is not in danger of losing. Employer has already benefitted from reduced payments by virtue of the Claimant's honest search for alternate employment when, in fact, Employer was originally prepared to concede that no such employment existed.

Employer urges that they are entitled to modification for two reasons. First, that the Claimant's earning capacity has changed. Second, they argue that the Claimant's physical condition has changed. We consider each argument in turn.

Claimant's Earning Capacity

Employer argues in their brief that the Claimant's earning capacity has changed and therefore our original award should be modified. We disagree. The Employer's position is based on the contention that in 1986, prior to his injury, the Claimant earned $21,745.36 per year. Employer's counsel compares that number to the Claimant's 1993 earnings with the Eglin Air Force Base Laundry of $22,869.78 and with a straight face asserts that the Claimant has therefore enjoyed an increase in his earning capacity of $1,100. (*See* Employer's Brief at 7). Given that increase the employer says, this Court can justify modification of relief under *Metropolitan Stevedore Co. v. Rambo*, 515 U.S.291 (1995).

Claimant's counsel counters that the Employer's figures do not account for inflation in the intervening years between 1986 and 1993. The Court cannot help but believe that this is true. A simple and established fact of a modern capitalist economy is that a dollar in 2000 is not worth as much as a dollar in 1993, much less in 1986. While the Claimant may indeed receive more individual dollars today than he did in 1986, the relative value of those dollars is substantially less than it was in 1986.

Prior Board decision instruct rather clearly that we must adjust the Claimant's post-injury wage earning capacity to account for inflation. In *Quan v. Marine Power and Equip. Co.*, 30 BRBS 124 (1996), the Board held that sections 8(c)(21) and 8(h) of the Act require adjustment of post-injury wages to account for inflation to represent what the post injury job would have paid at the time of the claimant's injury. *Id.* at 127. The Board then held that the increase in the National Average

Weekly (NAWW) wage over time was the most accurate reflection of the increase in wages over time. The decision instructs that the percentage increase in the NAWW for each year should be used to adjust the Claimant's post injury wage downward. *Id.* at 127 (following *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

The Court has reviewed available statistics and determined that the Claimant's assertions are correct. The NAWW at the time of the Claimant's injury was $302.66. The NAWW in 1993 was $369.15.[4] This represents an 81.99% increase in the NAWW.[5] Using this number, we adjust the Claimant's post-injury wage for inflation and find that the Claimant's post-injury wage is the equivalent of $18,750.93 in 1986 dollars.[6] The reality, as demonstrated by the properly adjusted numbers, is that the Claimant in this case has actually suffered a substantial decrease in his wage earning capacity. We find that this decrease amounts to $2,994.43 per year in wage earning capacity.

Employer next asserts that the Claimant's diminished wage earning capacity is the result of his failure to diligently seek employment. Their reasoning is that if the Claimant had sought another job while he was furloughed from his position at Ben's Lake Marina he would not have been unemployed for the better part of a year and therefore would have earned more. We find this argument difficult to stomach in so far as the Claimant in this case has honestly and credibly testified that he regularly sought work after recovering from his injury in 1991. While the Claimant has endured temporary periods of unemployment since his injury, we think that the Employer has failed to prove that these periods of unemployment were due to any fault of the Claimant. We see no reason to place additional obstacles in the path of an honest and hard working individual who is reasonably entitled to compensation. The Court finds that the Claimant is entitled to permanent partial disability benefits that will compensate him for his loss of wage earning capacity vis a vis his pre-injury wages.

Claimant's Physical Abilities

The Employer's second argument for modification is that the Claimant's physical condition has changed. In support of this claim, Employer points to the functional capacity evaluation (FCE) performed by HealthSouth and adopted by Dr. Crotwell. Employer also suggests that a change in the Claimant's physical condition is demonstrated by his post injury work history and that he has aggravated his injury through other causes for which they are not responsible. We find that there is no evidence that the Claimant's current physical condition is causally related to anything other than

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[4]Table of Compensation Rates as of October 1, 1999, *OWCP* 1999.

[5]$302.66/369.15 = 81.988, which we round to 81.99%.

[6]$22,869.78 x 81.99% = $18,750.93

his workplace accident. We also find that the fact Claimant has worked outside the restrictions recommended by the Claimant's treating physician does not mean that he has had a change of physical condition. In fact, the Claimant testified that, although he might have worked outside his restrictions as an apprentice mason, his back went out several times during the course of that work.

The court also finds that the evidence presented by Employer is insufficient to demonstrate a change of condition from a medical standpoint. Doctor Crotwell's report is based upon a single visit with the Claimant on August 26, 1996. (EX-2, p. 1). The addendum to his report wherein he suggests that the Claimant has a greater physical capacity than previously reported is based on that single visit and the FCE performed by HealthSouth. (EX-3, p.1). Even the HealthSouth FCE results do not necessarily give an accurate picture of the Claimant's physical limitations. In our view, the Claimant's performance on this test, combined with the evidence that he has worked outside his limitations in the past with mixed results highlights the problem with evaluations of this kind.

On certain days, Claimant may well be capable of working beyond his restrictions. Other days, Claimant may risk injury if he does so. Hence, the limitations are designed to ensure that if obeyed, the Claimant will be relatively sure he does not aggravate his injury. The FCE in comparison, accounts only for the Claimant's performance on a given day. If we adopt the FCE as the measure of the Claimant's abilities, we risk forcing him to attempt to perform up to the expectations of a good day on a continuing basis. The nature of injuries to the human body is such that this is not always possible. The Court is not persuaded that we should substitute the sporadic judgment of an independent medical examiner for the considered recommendations of the Claimant's treating physician who has been following him throughout his treatment for this injury. The Court therefore finds that there is insufficient medical evidence to support a motion for modification.

B. Compensation for Medical Treatment, etc.

There is apparently a historical difficulty in this case with obtaining the compensation that this court has ordered from the employer. In particular the Employer has abusively declined to pay for the Claimant's injury related medical treatment and particularly his psychiatric treatment. We declared in our original decision and order that the Claimant was entitled to such compensation, and we renew that declaration here.

To the extent that the Employer has never objected to the Court order that it pay for injury related psychiatric or psychological treatment and presents no evidence that a particular course of treatment was not related to this injury, we find that the employer is bound to pay for this treatment. The one exception to this finding is the Claimant's 1996 hospitalization for psychiatric problems. The Court excludes this treatment from coverage in light of the Claimant's testimony at trial that it was not related to his back injury. (2d. TX, 37-38).

Claimant's counsel has submitted 15 pages of medical bills related to the Claimant's workplace

injury that are as yet unpaid by the employer. (CX-11). In contrast, Employer responded to discovery by providing a list of medical expenses that it had paid to the Claimant or on his behalf. (CX-12). The medical records indicate that Employer owes the Claimant $175.45 for prescription medications that he required because of his back injury. (CX-11, pp. 2-9). In addition, Employer owes the Claimant $1801.35 for medical treatment and other expenses. (CX-11, pp. 10-15). Combined, these unpaid bills total $1,976.80.

Employer's discovery response shows that it has paid a total of $2,118.54 in medical costs for the Claimant. (CX-12). We note, however, that these costs were paid to but three medical providers. Specifically, $1,110 was paid to HealthSouth. HealthSouth was the medical provider that performed the FCE at the request of the Employer. An additional $190.00 was paid to Dr. Crotwell, also the Employer's physician who saw the Claimant once for an IME and did not render any treatment. Finally, $774.00 was paid to Dr. VerVoort, another Employer physician, for his independent medical treatment. We find that none of these payments actually covered the Claimants medical treatment.

The Claimant is entitled to medical treatment for his workplace injuries. He has already spent substantial sums for which he is entitled to reimbursement. In addition, he is entitled to have Employer authorize and pay for any future treatment he requires.

III. Contempt of Court

Claimant's counsel requests in her brief that we certify the facts of this case to the Federal District Court in order to have the Employer held in contempt of Court. Counsel reminds us that the Court and the Board have thrice before ordered Employer to pay for the Claimant's injury related medical care.[7] Since those orders were issued, the Employer has failed to comply with them. In discovery responses before this court the employer admitted to these previous orders and also admitted that the Claimant had sought authorization for injury related medical care "more than once." (CX-1, p.1). In flagrant disregard of these orders, the Employer has refused to authorize or pay for any of the requested treatment. (2d. TX, 81; CX-4; CX-5; CX-6; CX-7; CX-8; CX-9; CX-10; CX-13; CX-14; CX-16; CX-17; CX-18; CX-19; CX-20; CX-21; CX-25). Employer has, in fact, paid only the medical expenses related to the independent medical examinations that it orders with its choice of physician. (CX-1, p.6).

Even if this Court would like to hold the Employer in contempt for its actions or certify such facts to the District Court, we are unable to do so. Once a decision and order issues from this court, it is properly the province of the District Director and OWCP to enforce that order. If OWCP and the District Director fail or refuse to enforce the order of this Court, then the Claimant may petition

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[7]We so ordered in Jan. 15, 1993 *Decision and Order*, p. 9; and our August 15, 1993 *Order Denying Employer's Motion for Reconsideration*, p.1. The Board affirmed these orders in its opinion in *Gordon II*, pp. 2-3.

the Federal District Court under it's Federal Question Jurisdiction to enforce our final compensation order and to issue a writ of mandamus against the District Director to procure enforcement of our decision. *See Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 1304, 25 BRBS 145, 150-51 (CRT) (5th Cir. 1992).

ORDER

1. Having specifically found that Employer has not proven its case for modification, it is ordered that the Employer pay the Claimant compensation for permanent partial disability from the period after December 12, 1988 to date and continuing, based on an average weekly wage of $418.18 and his wage earning capacity of $274.00 per week;

2. Employer shall pay to Claimant funds in the amount of $1976.80 for past medical bills related to his injury. These medical costs are specifically itemized in CX-11. ;

3. Employer shall furnish Claimant's reasonable and necessary continuing medical treatment for his work related injury with the Claimant's choice of physician and subject to the provisions of Section 7 of the Act;

4. Employer is entitled to credit for all compensation previously paid to the Claimant as a result of the October 23, 1986 injury;

5. Employer shall pay Claimant interest on all accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the last auction of 52 week United States Treasury Bills as of the date this Decision and Order is filed with the District Director;

6. Claimant's Counsel, D.A. Bass-Frazier, shall have 20 days from receipt of this Order in which to file an attorney fee petition and simultaneously serve a copy of the petition on opposing counsel. Thereafter, Employer shall have 20 days from receipt of the fee petitions in which to respond to the petition.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge

RDM/ct